Office - Supreme Court, U. S.
FILED
NOV 16 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 471

SEARS, ROEBUCK AND CO., a corporation,

Petitioner,

vs.

LILLIAN M. HOYT and EZRA H. HOYT, JR.,

Respondents.

RESPONDENTS' REPLY BRIEF.

FRANCIS J. GABEL,
540 Title Insurance Building, Los Angeles,
Counsel for Respondents.

KENNETH J. MURPHY,
HENRY E. KAPPLER,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles

SUBJECT INDEX.

PAGE

Statement of the case 1

The petitioner having commenced the action as original plaintiff in the Superior Court of the state of California, improperly removed the said cause to the United States District Court, contrary to the removal statute, and the judgment rendered by the United States District Court was, under the circumstances, in excess of its jurisdiction and void and the Circuit Court of Appeals correctly decided that the case should be remanded to the state court 3

Conclusion 14

TABLE OF AUTHORITIES CITED.

CASES.

PAGE

Barth v. Coler, 60 Fed. 466 ..... 9, 10

Crehore v. Ohio and Mississippi R. Co., 131 U. S. 240, 33 L. Ed. 144 8

Goldstone Co. v. Payne, 94 Fed. (2d) 855 11

Houlton Savings Bank v. American Laundry Machine Co., 7 Fed. Supp. 858 12

La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645 6

Lomax v. Foster Lumber Co., 174 Fed. 959 11

M. C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 28 L. Ed. 462 9

McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893 13

Shamrock Oil and Gas Corp. v. Sheets, 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868 ..... 2, 4, 6, 7, 10, 13, 14

Stevenson v. Fain, 195 U. S. 165, 49 L. Ed. 142 8

Turmine v. West Jersey & Seashore R. Co., 44 Fed. (2d) 614 10

Waverly Stone & G. Co. v. Waterloo, 239 Fed. 561 10

West v. Aurora, 6 Wall. 139, 18 L. Ed. 819 ..... 2, 4, 5, 13

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 66 L. Ed. 144 13

STATUTE.

Judicial Code, Sec. 28 (28 U. S. C. A., Sec. 71) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 471

SEARS, ROEBUCK AND CO., a corporation,

Petitioner,

vs.

LILLIAN M. HOYT and EZRA H. HOYT, JR.,

Respondents.

RESPONDENTS' REPLY BRIEF.

Statement of the Case.

The petitioner, a foreign corporation, commenced an action in the Superior Court of the State of California, in and for the County of Los Angeles, against the respondents, to recover the sum of $6150.00 which the petitioner had been forced to pay to the widow and minor child of one Henderson Hutchinson, by reason of a death benefit award made by the Industrial Accident Commission of the State of California, the death of the said Hutchinson having allegedly been caused by the negligence of the respondent Lillian M. Hoyt in the operation of a certain vehicle. [Tr. pp. 2-5.] Thereafter the respondents filed an answer in the said Superior Court action together with a cross-complaint, wherein they sought to recover from

petitioner the sum of $29,929.40 by reason of personal injuries and property damage allegedly sustained as a proximate result of the negligence of the petitioner's employee, Hutchinson, in and about the operation of the vehicle which he was driving at the time of the fatal accident. [Tr. pp. 7-21.] Thereafter the petitioner herein filed a petition for removal of the cause to the United States District Court, accompanied by a bond on removal. [Tr. pp. 22-29.] The Superior Court of the State of California thereupon made an order removing said cause to the United States District Court. [Tr. p. 31.] The petitioner thereupon filed an answer to the cross-complaint [Tr. pp. 33-37] and the cause was tried before the court without a jury and judgment was rendered in favor of the plaintiff and cross-defendant and against the defendants and cross-complainants in said action. [Tr. pp. 49-50.]

After judgment in the District Court, respondents herein filed an appeal to the Circuit Court of Appeals [Tr. p. 52] and that Court reversed the judgment of the District Court and made an order remanding the cause to the Superior Court of the State of California, in and for the County of Los Angeles. [Tr. p. 177.]

It is now asserted by the petitioner that the Circuit Court of Appeals committed error and that the opinion of the Circuit Court of Appeals is in conflict with certain decisions of the various Circuit Courts of Appeal and of this Court. Respondents respectfully submit that the decision of the Circuit Court of Appeals is in conformity with the decisions of this Court, particularly, the cases of *West v. Aurora,* 6 Wall. 139, 18 L. Ed. 819, and *Shamrock Oil and Gas Corp. v. Sheets,* 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868.

The Petitioner Having Commenced the Action as Original Plaintiff in the Superior Court of the State of California, Improperly Removed the Said Cause to the United States District Court, Contrary to the Removal Statute, and the Judgment Rendered by the United States District Court Was, Under the Circumstances, in Excess of Its Jurisdiction and Void and the Circuit Court of Appeals Correctly Decided That the Case Should be Remanded to the State Court.

Respondents did not choose the forum of the State of California. The petitioner chose this forum by filing its complaint in the Superior Court of the State of California. By process duly issuing out of said Court, the respondents were required to file an answer. Since respondents sustained injuries and damage in the accident which was the subject matter of the litigation, they had a right, pursuant to the provisions of the Code of Civil Procedure of the State of California, to file, at the time they filed their answer, a cross-complaint. A cross-complaint was filed by respondents setting forth a claim for damages against the petitioner.

The record reveals that thereafter, and not by reason of any conduct on the part of respondents, the cause was transferred to the United States District Court. [Tr. p. 31.] Subsequent to the time the cause was transferred to the United States District Court, an answer to the cross-complaint was filed by the petitioner. The transcript is barren of any affirmative conduct on the part of respondents or their counsel which would indicate any acquiescence in any of the proceedings thereafter taken by the District Court.

Prior to the decision of this Court in the case of *Shamrock Oil and Gas Corp. v. Sheets,* 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868, there had been innumerable cases decided by the various District Courts and Circuit Courts of Appeal bearing upon the question whether or not a non-resident plaintiff who submitted to the jurisdiction of a state court was thereafter entitled to remove the cause to the United States District Court upon the filing of a counter claim or cross-complaint by the defendant in the action. These decisions were conflicting but this Court in the *Shamrock* case, *supra,* finally put an end to the conflict and decided the question in the negative, relying upon the early case of *West v. Aurora,* 6 Wall. 139; 18 L. Ed. 819.

This Court, in the *Shamrock* case, uses the following language:

> "In West v. Aurora, 6 Wall. (U. S.) 139, 18 L. ed. 819, this Court held that removal of a cause from a state to a federal court could be effected under section 12 only by a defendant against whom the suit is brought by process served upon him. Consequently a non-citizen plaintiff in the state court, against whom the citizen-defendant had asserted in the suit a claim by way of counterclaim which, under state law, had the character of an original suit, was not entitled to remove the cause. The Court ruled that the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction."

This Court then traced the history of the removal statutes and concluded that Congress in enacting the present statute in 1887 did not intend to change the rule

which was enunciated in the case of *West v. Aurora, supra.* In this regard, the Court significantly points out:

> "Not only does the language of the Act of 1887 evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' (Citing cases.)" (313 U. S. 100 at 107-109; 85 L. Ed. 1214, at 1219.)

This Court in the case of *West v. Aurora, supra,* said:

> "In the case before us, West and Torrence, citizens of Ohio, voluntarily resorted, as plaintiffs, to the state court of Indiana. They were bound to know of what rights the defendants to their suit might avail themselves under the Code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants to a suit, removable on their application to the circuit court of the United States. * * *
>
> "A suit removable from a state court must be a suit regularly commenced by a citizen of the state in which the suit is brought, by process served upon a defendant who is a citizen of another state, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the state court."

Section 28 of the Judicial Code (28 U. S. C. A., sec. 71) with reference to the removal of causes, provides, in part, as follows:

> "* * * any other suit of a civil nature, at law or in equity of which the district courts of the United States are given jurisdiction, in any state court, may be removed, into the District Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State * * *."

In construing the foregoing section of the Judicial Code, this Court held in the *Shamrock* case (*supra*) that the right to remove a cause from the State Court to the United States District Court was given only to a *defendant* and not to a cross-defendant as is the petitioner in the case at bar.

As was said in the case of *La Montagne v. T. W. Harvey Lumber Co.* (C. C. Wis.) 44 Fed. 645:

> "The term 'defendant' was, I think used in the removal act in its commonly accepted sense, and not with respect to the attitude of parties as to various causes of action preferred in one suit. The plaintiff is the party with whom the cause originates. The defendant is the party summoned to answer. Whatever causes of action may be permitted to be alleged against the plaintiff, he still remains the plaintiff upon the record; his antagonist, the defendant. * * * There is but one suit * * *. In that suit the party by whom it was instituted is the plaintiff, and so remains, whatever claims may be preferred against him. In that suit the party summoned is the defendant, and so remains, whatever rights he is permitted to assert against the plaintiff. It is to *this*

> *party*, known to the record as the defendant, being a nonresident that the law grants the right of removal. It is not given to the original plaintiff *under any circumstances*. Other construction would give to the nonresident plaintiff, who had selected as his forum a state tribunal * * * the right to bring that controversy into the Federal Court, notwithstanding the removal act denies to him that right, because his antagonist had asserted a claim. Invoking the assistance of a state court, the plaintiff was bound to know the right of the defendant to counterclaim, and *submitting to the jurisdiction, he submitted in its whole extent.*" (Italics added.)

Petitioner's whole argument to this Honorable Court is based upon the theory that the removal proceedings, *even though admittedly erroneous and improper,* did not affect the jurisdiction of the District Court to render a judgment since no objection or motion to remand was made by the respondents.

The Circuit Court of Appeals, however, indicated very clearly that in its opinion this Honorable Court considered the *regularity* of the removal proceedings *as going to the jurisdiction of the District Court.*

Respondents believe that the last paragraph of the decision in the *Shamrock* case (*supra*) contains the key to the solution of the problem involved in the instant case, wherein the Court says:

> "Not only does the language of the Act of 1887 evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power

> reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' (Citing cases.)" (313 U. S. 100 at 107-109; 85 L. Ed. 1214, at 1219.)

From the foregoing, it would appear that the true rule is that where a suit is commenced in a state court and is thereafter improperly removed to the United States District Court, the state court never does lose jurisdiction over the cause and for this reason the federal court would have no right or power to act further in the matter. See *Crehore v. Ohio and Mississippi R. Co.,* 131 U. S. 240, 33 L. Ed. 144.

The jurisdiction of the United States District Courts is conferred solely by statute.

Stevenson v. Fain, 195 U. S. 165, 49 L. Ed. 142.

As this Court points out in the *Shamrock* case, *supra,* the statutes which regulate the jurisdiction of the federal courts are subject to *strict construction.* It would therefore seem to follow that it was the *duty* of the United States District Court *to ascertain for itself, without reference to objection which could have been made and without reference to any motion to remand which might have been made, whether or not the removal proceedings were proper and whether the Court, under the circumstances, had jurisdiction over the cause.*

As the Court says in the case of *Barth v. Coler* (C. C. A.), 60 Fed. 466:

> "No motion appears to have been made in the Circuit Court to remand the case to the State court, but under the provisions of section 5 of the Act of March 3rd, 1875 (18 Stat. 701, 1 Supp. Rev. St. 175) it is made our duty, even in the absence of such a motion, to examine the record, and to order a remand if it appears to be suit that was not rightfully transferred to the federal court."

This Honorable Court said in the case of *M. C. & L. M. Ry. Co. v. Swan,* 111 U. S. 379, 28 L. Ed. 462:

> "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; * * * but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. *This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it.* * * *" (Italics added.)

In other words, it was the bounden duty of the United States District Judge to scan the record which was brought from the Superior Court of the State of California and

ascertain for himself whether or not the District Court possessed the requisite jurisdiction and whether or not the removal proceedings were regular and proper.

In the case of *Turmine v. West Jersey & Seashore R. Co.*, 44 Fed. (2d) 614, it is said:

> "If the suit was not rightfully in the federal court, it was the court's positive duty to order a remand. Barth v. Coler (C. C. A.) 60 F. 466. * * * The question of jurisdiction is one which the court is bound to ask and answer for itself, *whether suggested or not*, and without respect to the relation of the parties * * *" (Italics added.)

In *Waverly Stone & G. Co. v. Waterloo*, 239 Fed. 561 at 567, the Court says:

> "The plaintiff has not moved to remand the cause upon the ground above considered; but the Court may and should remand the cause upon its own motion, if the case * * * is not properly removed."

The principles which lie behind the rules which have been communicated in the decision of the Court in the cases of *Barth v. Coler, supra; Turmine v. West Jersey & Seashore R. Co., supra,* and *Waverly, etc. v. Waterloo, supra,* are predicated upon the doctrine which has been so succinctly expressed by this Court in the *Shamrock* case, *supra,* in the following language:

> "Due regard for the rightful independence of state governments which should actuate federal courts, *requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.*" (Italics added.)

The petitioner would have this Honorable Court believe that the question involved herein is not one of jurisdiction but is one of a *mere irregularity,* which could be waived by certain conduct. Petitioner concedes, as it must, that jurisdiction cannot be conferred upon the United States District Court by consent or by acquiescence. Such a concession of course was necessary since it is elementary law that jurisdiction can never be conferred upon a court by consent.

As the Circuit Court of Appeals said in the case of *Lomax v. Foster Lumber Co.,* 174 Fed. 959 at 967:

> "As this present case was wrongfully removed from the State court to the Circuit Court for the Eastern District of Texas, that court was without jurisdiction and no subsequent proceedings by consent or otherwise could give jurisdiction . . ."

In the case of *Goldstone Co. v. Payne,* 94 Fed. (2d) 855, at 857, the Court says:

> "Where a court has jurisdiction over the subject matter of an action, a defendant may submit himself to the court and thereby confer upon it jurisdiction of his person. But, where the court lacks jurisdiction over the subject matter of a case, the defect is not cured by getting personal jurisdiction of the defendant. Such a want of jurisdiction cannot be waived by pleading or any other form of consent—not even by going to trial. Mexican National Railroad Co. v. Davison, 157 U. S. 201; 15 S. Ct. 563; 39 L. Ed. 672."

Petitioner's argument with respect of the jurisdiction of the Court is predicated upon the premise that since the plaintiff was a foreign corporation it could have, if it had

so elected, *originally* instituted this cause in the District Court.

The difficulty with this argument is that the rights of the petitioner herein must be governed by what was *actually done* and *not by what could have been done.* Petitioner voluntarily selected the forum of the State of California in which to commence the law suit. Respondents duly answered process regularly issuing out of the Superior Court of the State of California. As the Court says in the case of *Houlton Savings Bank v. American Laundry Machine Co.,* 7 Fed. Supp. 858 at 861:

> "It is very true that bringing a suit in the State court is an election of a tribunal for the settlement of the rights involved in that suit, and a waiver of any right to change to another jurisdiction. Voluntarily taking the position of a plaintiff would, of itself, on the face of it, deprive that party of the right to remove, under the statute applicable here, in which the right is given to defendants only."

Petitioner places great stress upon the fact that respondents *could have made a motion to remand.* It argues that in the *Shamrock* case a motion to remand was made. This argument seems highly inconsistent to the respondents. In one breath the petitioner says that it has acquired a right to have its cause heard in the United States District Court by reason of the fact that it could have, if it had so desired, filed its suit in the first instance in the United States District Court since it was a nonresident, while in the next breath the petitioner asserts that the respondents conferred jurisdiction over this cause upon the District Court merely by reason of the fact that they failed to move to remand the cause when such a motion *could have been made,* even though not in fact made.

Again respondents assert that the true test is not what could have been done but what was done.

Furthermore, it seems to respondents that whether or not the respondents made a motion to remand would be of little moment in the determination of the serious question involved herein. It is settled law that if an order to remand is denied, review can be had only after final judgment. (*McLish v. Roff*, 141 U. S. 661, 35 L. Ed. 893; *Wilson v. Republic Iron & Steel Co.*, 257 U. S. 92, 66 L. Ed. 144. If respondents had presented a petition to remand and it had been denied, they would still have had to permit the matter to proceed *to final judgment before they could raise the very question which is involved in this appeal.* To say that merely by failing to make a motion to remand, under such circumstances, would be a bar to the respondents' right to raise the jurisdictional question, would be to reach a result which is utterly inconsistent with the rules laid down by this Honorable Court in the *Shamrock* case, *supra,* and in other cases already cited.

As this Honorable Court said in the case of *West v Aurora, supra:*

> *"The question here is not of waiver but of the acquisition of a right which can only be conferred by an act of Congress."*

Respondents respectfully submit that the case at bar is governed by the rule enunciated in the *Shamrock* case and that if any of the cases cited by petitioner are in conflict therewith, it was the intention of this Honorable Court when it decided the *Samrock* case, to overrule any prior decisions which may have been inconsistent therewith.

Conclusion.

In conclusion, respondents respectfully submit that the Superior Court of the State of California, in and for the County of Los Angeles, never lost jurisdiction over the cause of action involved herein, which was voluntarily submitted to the forum of the State of California by petitioner and that under the circumstances the United States District Court was without jurisdiction to hear and decide this cause in the face of the ruling of this Honorable Court in the case of *Shamrock v. Sheets,* 313 U. S. 100, 85 L. Ed. 1214, 61 Sup. Ct. 868; that the United States District Court was under a duty to examine the record to ascertain whether or not the case had been properly removed and that under the circumstances of this case should have, of its own motion, remanded the cause to the state court; that the rights of respondents herein cannot be prejudiced by any so-called doctrines of waiver.

It is respectfully submitted that the petition for a Writ of Certiorari should be denied and that the mandate of the Circuit Court of Appeals should be permitted to stand.

Respectfully submitted,

FRANCIS J. GABEL,

Counsel for Respondents.

KENNETH J. MURPHY,

HENRY E. KAPPLER,

Of Counsel.